United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7591, 77-7016

United States Court of Appeals

FOR THE SECOND CIRCUIT

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA LANDAU, MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI KOREN AND DALIA KOREN,

Plaintiffs,

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, MORDECHAI MUSCATEL and HAGAI KOREN,

Plaintiffs-Appellants,

v.

STANDARD PRECISION A DIVISION OF ELECTRONIC COMMUNICATIONS, INC., ELECTRONIC COMMUNICATIONS, INC., THE NATIONAL CASH REGISTER COMPANY AND NORTH AMERICAN ROCKWELL CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT ISRAEL AIRCRAFT INDUSTRIES, LTD.

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Preliminary Statement

Relying solely upon the "bright glare of hindsight" [1] and ignoring the factual history of the litigation, Appellee Standard Precision alleges on this appeal that the non-discovery and non-disclosure of the releases[2] in the million

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[1] *Kupferman* v. *Consolidated Research & Manufacturing Corp.*, 459 F.2d 1072, 1080 (2d Cir. 1972).

[2] The releases at issue were given in 1970 and 1971 by the individual crew member plaintiffs to their employer, Israel Aircraft

dollar litigation below was the result of a deliberate and fraudulent plan of deception. The object of this alleged plan, Standard Precision asserts, was to preserve Israel Aircraft's ability to recover from its crew member employees the sum of $11,000.

Upon reviewing the events from which Standard Precision constructs its allegations and the context in which those events occurred, it is clear that Standard Precision's arguments are inherently illogical and unsupportable from the evidentiary record.

An examination of Standard Precision's arguments in light of the record discloses three assumptions which one must accept on blind faith to lend coherence to Standard Precision's position:

1. Israel Aircraft, a billion dollar corporation, doing over one hundred million dollars business annually in the United States alone, would risk its corporate integrity and impeccable reputation for the possible recovery of $11,000;

2. Israel Aircraft and Condon & Forsyth, attorneys for its insurers, acting in concert, would deliberately suppress the existence of releases that would have been a complete defense to Standard Precision's counterclaim in excess of one million dollars;

3. William L. Schierberl,[3] a long standing and highly respected member of the New York bar and the bar of

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Industries, Ltd. (Israel Aircraft throughout) in exchange for aggregate payments of 90,000 Israeli Pounds which, at the rate of exchange in effect at the date of the jury verdict, was equal to approximately U.S. $11,000.

[3] Mr. Schierberl is the partner of Condon & Forsyth, insurance counsel for Israel Aircraft, who was and is personally responsible for this case, and who in fact handled it from its inception.

this Court, and Mrs. Herzela Ron,[4] a long standing and highly respected member of the Israeli bar, would submit false affidavits explaining the post-verdict disclosure of the releases which categorically deny any plan of deception or fraudulent intent to withhold material documents or information.

Standard Precision asks this Court to ignore the illogic of the foregoing assumptions and the absurdity of the allegation that Israel Aircraft intentionally withheld the releases in this case. In addition, Standard Precision argues that this Court should reject as "incredible" the uncontroverted affidavit testimony of Mr. Schierberl and Mrs. Ron, which flatly denies any deception or intent to mislead.

Standard Precision's argument proceeds, essentially, as follows:

1. The answers to the prelitigation questionnaire, prepared by the crew members with the assistance of Israel Aircraft, were intended to mislead the parties and the District Court into believing that the payments made by Israel Aircraft to the crew were in the nature of Workmen's Compensation payments not involving releases;

2. Condon & Forsyth knew, prior to the conclusion of the liability trial, of the existence of the releases and did not disclose them;

3. Knowing of the existence of the releases, Condon & Forsyth did not produce the "personnel records" which contained the releases;

4. Israel Aircraft knew of the relevance of the releases to the litigation and intentionally withheld them from disclosure prior to the jury verdicts.

This Reply Brief will demonstrate that there is neither any evidence in the record nor any logical inferences to

[4] Vice-President and General Counsel of Israel Aircraft Industries, Ltd.

be drawn therefrom which could possibly support this argument.

POINT I

The Answers to the Informal Prelitigation Questionnaire Were Not Intended to Deceive Anyone.

The alleged "pattern of deception" which the District Court "found" (App. 224a-225a, 339a-340a) and upon which Standard Precision attempts to elaborate on this appeal is based upon certain answers to a prelitigation questionnaire. (Brief for Appellees, pp. 4, 5, 10 and 29).

Prior to the commencement of this litigation, Condon & Forsyth, counsel for the insurers, asked its London counsel to send an informal prelitigation questionnaire to the individual crew members. The crew members, in answering the questionnaire, requested and received the assistance of Israel Aircraft's Director of Insurance. The answers were sent to Condon & Forsyth, who at that time also represented the crew, for their use in preparing for the litigation. The answers to three questionnaire items described all payments made to the crew as a result of injuries in the accident.[5]

Standard Precision grounds its claims of a "pattern of deception" primarily on the crew's answers to Question 13. The answer to Question 13 must be read in conjunction with Questions 11 and 12. The answer to Question 11 was completely ignored by Standard Precision and the District Court. These questions request:

> 11. Details of any injury insurance payments under the State scheme (interim and final payments).

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[5] The questionnaire itself and the answers thereto describing the payments were disclosed to counsel for all parties prior to the crew's depositions in July, 1974. They can be found at pp. 326a-333a of the Appendix.

12. Details of any injury payments made by IAI [Israel Aircraft].

13. Whether or not any of the above-mentioned payments *are taken into account and deducted from damages under Israeli law.* (App. 327a) (emphasis added).

Standard Precision's attorneys contend that the crew's answers to Question 13 were intended to mislead them into believing that the payments by Israel Aircraft were in the nature of Workmen's Compensation payments, which do not require releases.

While acknowledging that all U.S. counsel erred in assuming that the payments described in answer to Question 12 were in the nature of Workmen's Compensation, Standard Precision attributes the error to the "deception" practiced in answering Question 13 rather than to its own inaccurate understanding of the law of Israel. Standard Precision would have this Court believe that the "deliberately misleading" answers to Question 13 excuse its failure to explore the nature of those payments or discover the releases.[6] The answers of crew members Landau and Muscatel to Question 13 are:

"The capitalised value of the pension is taken into account under Israeli Law. The payment made by IAI is not a subject to law as it was an *ex gratia* payment; it was agreed that in case the *present action* succeeds, it will be refunded to IAI out of the proceeds." [Landau] (App. 329a) (emphasis added).

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[6] Standard Precision seeks to discredit Condon & Forsyth's explanation for not discovering the releases after trial as follows: "Prior to the October 26 opinion, Israel Aircraft said the releases had not been revealed because their counsel misunderstood the law while after October 26, their counsel said he didn't know of the releases" (Brief for Appellees, p. 27). Rather, these two explanations are consistent since Condon & Forsyth did not know or even suspect the existence of the releases because of its misunderstanding as to the law. (App. p. 228a, ¶ 9).

> "Payments per Para. 11(b) would be taken into account under Israeli Law; payment per Para. 12 is not a question of law since it was an *ex gratia* grant; *it was now agreed* that in case Mr. Muscatel's action is successful, he will refund this grant out of the proceeds." [Muscatel] (App. 332a) (emphasis added).

Standard Precision alleges that parts of these answers are intentionally misleading[7] in that:

(1) The payments by Israel Aircraft were described as "ex gratia" to convey the meaning that they were made without consideration while the releases, in effect, constituted consideration; and,

(2) The statement that the payments were to be refunded from the crew's recovery was intended to convey the impression that a reimbursement obligation was inherent in the initial payment as in Workmen's Compensation situations.[8]

Analytically, the source of the "deception" claimed by Standard Precision is its routine application of American concepts to the answers and its lack of knowledge of the law of Israel. To extract from the answers an intent to mislead one must presume that:

(a) The crew and Israel Aircraft's Director of Insurance had full knowledge of the Workmen's Compensation Laws in the United States, were aware of the fact that, at that time, U.S. employees were uniformly precluded from suing their employers for injuries sustained during employment and that payments made under Workmen's Compensation statutes are not made against releases and must be refunded out of recoveries against third parties;

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[7] While urging the Court that its misapprehension of the payments was innocent, Standard Precision demands that the Court regard the identical innocent misapprehension by Condon & Forsyth as fraudulent. See nn. 11 & 12, *infra*.

[8] For treatment of the reimbursement agreement, see Point VI, *infra*.

(b) The crew and Israel Aircraft's Director of Insurance "guessed" that Standard Precision would incorrectly interpret Answer 13 by assuming that Israeli law was the same as United States law; and

(c) The crew and Israel Aircraft's Director of Insurance, with intent to mislead, tailored the answers to coincide with the anticipated mistakes of the United States attorneys so as to bring about a desired erroneous interpretation (i.e., that the payments were in the nature of Workmen's Compensation, not requiring releases) consistent with a scheme to conceal the releases.

Clearly, these presumptions of Standard Precision, which one must adopt to conclude that the answers were intended to mislead, are too implausible to be taken seriously.

More importantly, the argument and the conclusion built on these presumptions are, at best, erroneous and contrary to the record. First, the record shows that the prelitigation questionnaire and the answers provided by the crew and Israel Aircraft were drafted and intended only for the use of the attorneys for the crew (who at the time were Condon & Forsyth) in preparation for litigation.

Second, the answers to the questionnaire were neither "deceptive" nor inaccurate. Answer 13 addressed the issue of whether the payments referred to in Answers 11 and 12 are to be taken into account and deducted from damages pursuant to the law of Israel. Answer 11 describes payments by the National Insurance Institute of Israel,[9] while Answer 12 refers to those made by Israel Aircraft.

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[9] The payments, described in Answer 11, were made under Israel's NATIONAL INSURANCE LAW (1953) which replaced Israel's former WORKMEN'S COMPENSATION ORDINANCE (1947). Thus, the payments detailed in Answer 11 were in fact Workmen's Compensation payments in Israel. Therefore, an Israeli answering Question 12 could not have intended to mislead anyone into thinking

Therefore, read in this context, the answers of Landau and Muscatel provide the following information:

(a) Payments under the State scheme are to be taken into account under Israeli law in determining the amount of compensation recovered from a third party;

(b) Payments made by Israel Aircraft are not to be taken into account and are not deductible under Israeli law, since they were made as an "ex gratia" grant;[10] and

(c) In conjunction with the joining of the crew in the litigation, it was agreed that the "ex gratia" grant would be refunded out of the proceeds if their suits were successful.

It is particularly important to focus on (b) and (c) above since this information is what is alleged to be wilfully misleading. As to (b), it is significant that under Israeli law "reparations made by the benefactor voluntarily, without obligation to grant such reparations, are not to be taken into account." Professor Tedeschi, et al., *The Law of Torts,* 2d Ed. 1976, Sec. 395, page 645. The answers were therefore accurate under Israeli law (which was called for in the questions) and the use of the term "ex gratia" was pertinent in answering Question 13 because Israel Aircraft's payments to the crew were voluntary and both Israel Aircraft and the crew believed that Israel Aircraft had no legal liability with respect to the accident. (App. 302a, ¶ 7(a); 306a, ¶ 14; 269a-70a, ¶ 7.)

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that the payments detailed by him in Answer 12 were Workmen's Compensation payments because he had already described such payments in Answer 11.

[10] App. 306(a), ¶ 14. See also Black's Law Dictionary (4th Ed. p. 660) defines "ex gratia" as "[o]ut of grace, as a matter of grace, favor or indulgence, gratuitous. *A term applied to anything accorded as a favor; as distinguished from that which may be questioned by ex debito, as a matter of right*". (emphasis added).

As to (c) above, careful reading of the Landau and Muscatel answers shows that the agreements to reimburse were made subsequent to and independent of the payments. Landau indicated that the agreement to reimburse was made in contemplation of the "present action." Muscatel's answer is even clearer in this respect, noting "it was *now* agreed," (i.e., when preparing the answers) that he would, if successful, refund payment. Thus Standard Precision's assertion that the answers misleadingly indicate that the agreement to reimburse was made at the time the payments were made, is refuted by the answers themselves.

Even assuming that the questions and answers had been prepared with American law and American lawyers in mind, it cannot be said that the answers were designed to deceive. In American jurisdictions, Workmen's Compensation is a matter of right under statute, not a matter of grace. Moreover, both the Landau and Muscatel answers to Question 13 refer to "agreements" between Israel Aircraft and the crew for repayment from the crew's recovery whereas recoupment of Workmen's Compensation payments is dictated by statute and is not a matter of "agreement" between the employer and employee. Further, United States Workmen's Compensation schemes provide for a lien to the employer to secure repayment from the employee rather than direct refund from the employee's recovery.

In view of the above, it is clear that the erroneous belief shared by all United States counsel that the payments made by Israel Aircraft were in the nature of Workmen's Compensation payments under American legal concepts, cannot be attributed in any way to any misleading statements in the answers to the questionnaire. It is equally evident that this shared, mistaken belief stemmed from the erroneous assumption on the part of all United States counsel that United States and Israeli law were the same

in that an employee cannot sue an employer for injuries sustained in the course of employment. However, while counsel for Israel Aircraft candidly concede their misunderstanding as to the nature of these payment,[11] counsel for Standard Precision attempt to excuse their erroneous beliefs, assumptions and misunderstandings by weaving an imaginary "pattern of deception" and laying it at the door of Israel Aircraft and its counsel.[12]

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[11] Standard Precision notes a "curious contradiction" between this misunderstanding by Condon & Forsyth and unspecified testimony of Mrs. Ron (Brief for Appellees, pp. 9-10). Standard Precision claims that Mrs. Ron testified:

> "... that she cannot understand why the *answers* could mislead anyone into thinking the payments were in the nature of workmen's compensation."

What Mrs. Ron actually stated was:

> "I do not understand how it can be claimed that *this description of these payments as 'ex gratia'* could have been intended to mislead anyone into concluding that the payments were workmen's compensation." (App. 306a, ¶ 14). (emphasis added).

Mrs. Ron's statement is confined to the term "ex gratia." Only counsel for Standard Precision alleged that the term was misleading. Condon & Forsyth has never claimed that it was misled either by that term or any other part of the answers (App. 228a-229a, ¶ 9). Hence, there is no contradiction whatever. The misquotation by Standard Precision, which distorts the essential meaning of Mrs. Ron's testimony, is yet another example of Standard Precision's attempt to create "evidence" where none exists.

[12] Indeed, counsel for Standard Precision tries to have it both ways. In one breath it argues that its mistake was reasonable because Condon & Forsyth was likewise "misled" and reached the same conclusions:

> "The answers were false and were calculated to and did mislead defendants into thinking that the payments were in the nature of Workmen's Compensation (note that Schierberl, of Condon & Forsyth, counsel for IAI and the crew members says that he was similarly misled.)" Brief for Appellees, p. 29.

In the next breath it contends, both by innuendo and accusation, that Condon & Forsyth was an active participant in the deception:

> "These [answers] were prepared by [Schierberl's] clients in contemplation of this litigation and the questionnaire was forwarded to IAI at the request of Condon & Forsyth. Thus, they were very close to the source of the misunderstanding,

Standard Precision now insists that it was prevented from learning of the releases and the true nature of the payments[13] since it was a victim of fraud. Actually, Standard Precision did not learn of the releases because it applied United States concepts and misconstrued the payments to be Workmen's Compensation.

The evidence is that the accurate and direct answers to this questionnaire fully disclosed the payments to the crew by the National Insurance Institute and the payments by Israel Aircraft. Thus there is no basis in fact for the alleged "pattern of deception."

POINT II

The Conclusion That Condon & Forsyth Did Not Know of the Existence of the Releases Until After Conclusion of the Trial Is Inescapable.

Standard Precision suggests by innuendo that Condon & Forsyth knew about the releases prior to the trial. Standard Precision infers from Mrs. Ron's statement that Israel Aircraft was never asked for the releases (App. 305a, ¶ 12) that Condon & Forsyth must, therefore, have learned about them or received them from the crew in 1974. Yet it is clear from paragraphs 2(b) and 15 of Mrs. Ron's affidavit, which Standard Precision ignores, that Mrs.

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if misunderstanding it was." Brief for Appellees, p. 10 (emphasis added).

"Deliberate frustration of discovery *began* with the production of the written questions and answers of the individual plaintiffs. Plaintiff would have us believe these documents are an indication of a commitment to full discovery (IAI Brief, p. 28)."

"As can be seen the answers are false for the simple reason that the money paid each individual was paid as consideration for a release." Brief for Appellees, pp. 37-38.

[13] It is undisputed that Standard Precision's counsel had a full and open opportunity to question the crew during lengthy depositions and was free, for example, to inquire as to "payments," "agreements," the crew's conception of Israeli law or anything else regarding these payments. (App. 351a-354a).

Ron limited her statement, *that the releases were never asked for,* to the period *before* the jury verdict. (App. 299a, 306a). Of course when, during the damage trial, Condon & Forsyth first learned of the possible existence of documents affecting the crew's claims against Israel Aircraft, Condon & Forsyth immediately sent a telex to Israel Aircraft inquiring about such documents (App. 227a, ¶¶ 4, 5) and received a telex reply containing a translation of the Landau Release (App. 228a, ¶¶ 6, 7).

Standard Precision also suggests by innuendo that other persons at Condon & Forsyth might have known about the releases, because only Mr. Schierberl filed an affidavit attesting to his lack of knowledge concerning the releases;[14] and that Condon & Forsyth could not get the medical records without having access to the personnel records containing the releases.[15]

Standard Precision's continued suggestions in their brief that Condon & Forsyth was aware of the releases throughout the litigation and knowingly concealed them from the Court and Standard Precision, is neither true nor supported by anything contained in the record. On the contrary, the record clearly demonstrates that no one at Condon & Forsyth had any knowledge of the possible existence of the releases prior to the conclusion of the liability trial and did not see the releases until after the damage trial was concluded.

This is fully supported in the record as follows:

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[14] Standard Precision's tactic of inferring fraud from the fact that "no such affidavits were filed by any of the other Condon & Forsyth lawyers" is an example of their repeated attempts to create "evidence" by distortion and inference where there is none in the record. (Brief for Appellees, pp. 24-25).

[15] The record clearly demonstrates that the medical records were obtained in response to the questionnaire prior to the commencement of the litigation. Standard Precision insists that Condon & Forsyth "came into possession" of the medical records "sometime between January 10, 1974 and July 22, 1974." From this single distortion of the record Standard Precision constructs an elaborate pyramid of sinister "inferences" to shore up its argument. (Brief for Appellees, p. 26).

(1) Condon & Forsyth first learned of the possible existence of the releases only after the liability trial concluded. (App. 227a);

(2) Condon & Forsyth promptly telexed Israel Aircraft and inquired as to the existence of the releases while the damage trial was in progress. (App. 227a, 232a-233a);

(3) Condon & Forsyth first saw a release (a telexed translation of Landau's release) after the damage trial concluded. (App. 228a, 234a-237a);

(4) Mr. Schierberl travelled to Israel to view the releases and discuss their significance with Israeli counsel and Israel Aircraft. (App. 228a);

(5) Immediately upon learning of the significance of the releases, Mr. Schierberl telephoned, from Israel, Standard Precision's counsel in New York and advised them of the releases. (App. 230a); and

(6) Immediately upon returning to the United States, Condon & Forsyth provided copies of translations of the releases to the Court and all counsel by cross-motion on March 26, 1976. (App. 183a-194a).

Thus, the uncontradicted *evidence* is that Condon & Forsyth did not know of nor have any suspicion whatsoever of the existence of the releases prior to the conclusion of the liability trial.

POINT III

Condon & Forsyth Did Not Ask Israel Aircraft To Forward the "Personnel Records" Pursuant to Standard Precision's Notice to Produce.

Prior to the initiation of this lawsuit, Condon & Forsyth fully investigated the accident involved and requested and received from Israel Aircraft a voluminous amount of documentation regarding the liability issues. Condon &

Forsyth asked its London counsel to send to the individual crew members the informal prelitigation questionnaire discussed in Point I, *supra*. Condon & Forsyth was at that time representing the crew. The answers to the prelitigation questionnaire contained all of the essential personnel information which Condon & Forsyth believed relevant to the crew members' claims. After receiving the answers to the questionnaire, as well as the requested medical records and documents regarding disability assessments, Condon & Forsyth requested nothing more of Israel Aircraft concerning the crew.

When Standard Precision's Notice to Produce was served, the overwhelming emphasis of those requests concerned the seriously disputed liability issues. In dealing with the mass of documents relating to the liability issues, the request for the "personnel records" contained in Item No. 11 was lost in the give-and-take of discovery. Thus, at the document-marking session where Mr. Schierberl's allegedly "false assurances" were made, the focus of the proceedings was still on the closely contested liability issues, and the "personnel records" request assumed no particular importance to either side.[16]

With the approach of the crew's depositions scheduled later that month, in early July, 1974 the parties began to focus on the crew members' claims. On July 2, 1974, counsel for Standard Precision asked for "authorization to obtain medical records of plaintiffs". (App. 135a). Then, prior to the depositions which commenced on July 22, 1974, the crew substituted the firm of Fuchsberg & Fuchsberg for Condon & Forsyth as their counsel. At that time, Condon & Forsyth produced all of the documents it had relating to

[16] The complete transcript of the January 10, 1974 document-marking session is contained in the Record at Index No. 103.

the crew's claims by providing the questionnaire, the answers thereto, the medical records and disability assessment documents (which were supplied in response to the questionnaire), not only to the crew's new counsel, but also to counsel for Standard Precision. After doing this, and after the substitution of counsel,[17] Condon & Forsyth, rightly or wrongly, no longer felt any responsibility for document production relating to the crew's claims.

After the depositions, Standard Precision made a motion directed against all plaintiffs to compel production of many documents, including the "personnel records." Standard Precision now argues that the District Court was misled into thinking that the "personnel records" had been produced (Brief for Appellees, pp. 10-11, 23) because Condon & Forsyth replied, by affidavit of Mr. Turner, that:

> 4. On July 5, 1973 defendants' counsel served a Notice for the Production of Documents upon the counsel for Israel Aircraft Industries, Ltd. In response, on January 10, 1974 and at various subsequent depositions, plaintiffs produced a substantial number of documents, which constituted all the documents in its possession which relate to the facts of this case. (App. 118a-119a)

Standard Precision chooses to read this statement out of context as meaning that Israel Aircraft was stating by counsel that it had produced all documents including the "personnel records" (which was not in fact the case). Standard Precision maintains that the District Court "believed" these "false" statements of Mr. Turner, and was thereby "induced" to deny Standard Precision's

[17] Standard Precision's contention that substitution of counsel never took place is refuted by the recognition of Fuchsberg & Fuchsberg as counsel for the crew by both counsel for Standard Precision and the District Court. (Compare App. 349a with App. 353a; see App. 210a, fn. 2.)

motion. (Brief for Appellees, p. 11). However, Mr. Turner's affidavit is clear that Condon & Forsyth had not produced the "personnel records":

> 5.(3) Upon information and belief the personal counsel for plaintiffs Landau, Muscatel and Koren have transmitted or are in the process of transmitting all personnel records to defendants' counsel. (App. 119a)

This was also made clear, in a subsequent affidavit by Mr. Schierberl on the same motion.[18]

In its reply to Mr. Schierberl's and Mr. Turner's affidavits, Standard Precision never questioned or corrected the understanding of Condon & Forsyth that the personnel records were going to be produced by the crew's new attorneys. Indeed, Standard Precision had over a year, after its motion, to make further inquiries concerning the "personnel records," which, in accordance with Mr. Turner's affidavit, were to be furnished by the crew's counsel. Nor did Standard Precision inquire further of Condon & Forsyth with respect to said records. The crew's counsel received a copy of Mr. Turner's affidavit and never questioned or corrected this understanding either.

Condon & Forsyth had no reason, therefore, to suspect that the "personnel records" were not furnished to Standard Precision by Fuchsberg & Fuchsberg. It was not until Standard Precision's post-trial motion that Condon & Forsyth first learned that the "personnel records" had not been produced.

In the final analysis, all of Standard Precision's allegations against Condon & Forsyth are founded upon the erroneous assertion that Condon & Forsyth knew of the

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[18] App. 134a, ¶ 7.

existence of the releases prior to the trial. The uncontradicted evidence shows otherwise. See Point IV *supra*. In the period preceding substitution of counsel, the "personnel records" request became lost in the give and take of the complicated and protracted discovery of technical matters relating to liability. After substitution of counsel, Condon & Forsyth assumed that the production of the "personnel records" was being handled by Fuchsberg & Fuchsberg.

POINT IV

Israel Aircraft Did Not Produce the Releases Because It Was Not Asked for the Personnel Records by Condon & Forsyth and Was Not Aware of the Counterclaim.

The Court below held and Appellee Standard Precision argues that Israel Aircraft's failure to produce the "personnel records" pursuant to Item 11 of Standard Precision's Notice to Produce was part of a deliberate plan of deception to prevent the disclosure of the releases. (App. 225a; Brief for Appellees, p. 25). However, the reason Israel Aircraft did not produce the "personnel records" was that its attorneys Condon & Forsyth did not forward the Notice to Produce to Israel Aircraft or otherwise ask that they be produced. See Point III, *supra*, where the reasons Condon & Forsyth did not request the "personnel records" are discussed. Therefore, since Israel Aircraft was not aware of the Notice to Produce and was not asked to produce the "personnel records", it could not have deliberately intended to prevent the disclosure of the "personnel records."

Although Israel Aircraft was not aware of Standard Precision's counterclaim until after the jury verdict on damages (App. 299a-301a), Standard Precision, neverthe-

less, seeks to impute to Israel Aircraft knowledge of the counterclaim because Condon & Forsyth knew of them. From this, Standard Precision argues that Israel Aircraft had a duty to assert the releases as a defense. Constructive knowledge and intent do not satisfy the standard of wilfulness or fraudulent intent under Rule 37 or Rule 60. The imputation of such knowledge or intent is especially inappropriate in this case, where, had Israel Aircraft been aware of the counterclaim in excess of $1,000,000, it would have been in *Israel Aircraft's decided interest* to assert the releases as a defense to the counterclaim.

Prior to the jury verdict on liability, Israel Aircraft believed it was a nominal plaintiff party[19] to the subrogation claim only. Not being aware of the counterclaim until after the jury verdict, Israel Aircraft was therefore also unaware of the fact that it had, in effect, become a third-party defendant to the crew's claims against Standard Precision. Accordingly, as the evidence shows, Israel Aircraft had no reason to consider the releases or their possible relevance to the New York litigation.

Plainly the releases had no relevance whatsoever to the hull damage claim. Moreover, Israel Aircraft had no reason to believe the releases had any bearing on the crew's claims against Standard Precision since Israel Aircraft and the crew did not intend the releases to bar these claims against third parties such as Standard Precision (App. 269a-271a; 301a-304a). Further, both Israel Aircraft and the crew were acting on the assumption that Israel Aircraft was not liable for the crew's injuries[20] and, con-

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[19] As such, Israel Aircraft never knew, until after the October 26 judgment, of the Notice to Produce, the Motion to Dismiss for Failure to Produce or the allegations of fraud that were asserted against it in the post-trial motions. (Brief for Appellant Israel Aircraft, pp. 10 and 14; Mrs. Ron's Affidavit, App. 299a-307a).

[20] App. 302a, ¶ 7(a).

sequently, that the "ex gratia" payments would have no bearing under Israeli law on the crew's recovery against Standard Precision.[21]

Standard Precision tries, however, to find a contradiction in the fact that Israel Aircraft stated that it did not believe that there was any relevance between the releases and the crew's claims against Standard Precision, but later argued that these same releases barred the crew from recovering 65% of the jury award from Israel Aircraft. In fact, there is no contradiction whatsoever. After the jury verdict on liability, Israel Aircraft learned that the jury had attributed to it 65% of the responsibility for the accident. Then, for first time, the counterclaim, of which it had previously been unaware, became known to Israel Aircraft and the releases became relevant. Israel Aircraft made its demand to the crew *only* after the releases had become known to all since Israel Aircraft, though not intending the releases to release the whole world, certainly intended and believed them to bar all claims directly or indirectly against itself and the Ministry of Defense.

POINT V

The Finding of Fraud Is Not Supported by Clear and Convincing Evidence.

The New York Court of Appeals established the elements of an action for fraud when it stated "the essential constituents of the action are fixed as representation of a material existing fact, falsity, *scienter*, deception and injury." *Channel Master Corp.* v. *Aluminium Limited Sales, Inc.*, 4 N.Y.2d 403, 407, 176 N.Y.S.2d 259, 262 (1958). Further, "actual knowledge" of the facts constituting the fraud must be known to a party before fraud can be found.[22] For

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[21] See pp. 8-10, *supra*.

[22] *CC Lumber Co.* v. *Waterfront Commission of New York Harbor*, 36 A.D.2d 909, 320 N.Y.S.2d 774 (1st Dept., 1971). Thus,

this reason, fraud can never be found on the basis of negligent conduct. *Federation Chemicals, Ltd.* v. *Chemical Construction Corp.*, 31 A.D.2d 799, 297 N.Y.S.2d 398, 400 (1st Dept. 1969). Thus, fraudulent intent must be proved and can never be presumed. *Maitrejean* v. *Levon Properties, Corp.*, 45 A.D.2d 1020, 358 N.Y.S.2d 203, 205 (2d Dept. 1974); *Eaton Factors Co.* v. *Double Eagle Corp.*, 17 A.D.2d 135, 232 N.Y.S.2d 901, 903 (1st Dept. 1962). Each of the elements must be shown by clear and convincing evidence. Mere non-disclosure of the releases is not sufficient to establish fraud. *E.g., United States* v. *International Telephone & Telegraph Corp.*, 349 F. Supp. 22, 29 (D. Conn. 1972), *aff'd* 410 U.S. 919 (1973) (*sub nom. Nader* v. *United States*).

At the time the District Court dismissed Israel Aircraft's complaint, it acted on its own motion and without notice and hearing. The District Court abused its discretion in rejecting the affidavit evidence submitted by Condon & Forsyth and Israel Aircraft because there were no counter-affidavits submitted that controverted the factual statements contained therein. *Carver* v. *Liberty Mutual Insurance Co.*, 277 F.2d 105, 109 (5th Cir. 1960). The District Court's incredulity cannot nullify the facts established by uncontroverted affidavit testimony on a Rule 60(b) motion. *Estate of Murdoch* v. *Commonwealth of Pennsylvania*, 432 F.2d 867, 870 (3d Cir. 1970); *Peacock Records, Inc.* v. *Checker Records, Inc.*, 365 F.2d 145, 147 (7th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967).

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for example, fraud cannot be found on the basis of promises with regard to future performance, unless it can be shown that, at the time the representations were made, the party against whom fraud is alleged must have known that no performance would ever be made. *Sabo* v. *Delman*, 3 N.Y.2d 155, 159-60, 164 N.Y.S.2d 714, 716 (1957).

The District Court's finding that the affidavits and submissions of Israel Aircraft in support of reconsideration were "incredible" does not strengthen or support the decision to which it adhered, a decision finding "fraud on the court" *sua sponte* without notice or hearing before any evidence was submitted on the issue of fraud. Brief for Appellant Israel Aircraft, pp. 22-24, 43-44. The District Court, in refusing reconsideration, erroneously operated on the premise that its original finding of fraud was factually unassailable. Thus, when uncontradicted evidence *was* submitted which showed an absence of fraud, the Court rejected it as "incredible."

Neither the District Court nor Standard Precision have sustained their essential burden of establishing from the record "clear and convincing probative facts" showing scienter, fraud or wilfulness. *Di Vito* v. *Fidelity and Deposit Co. of Maryland*, 361 F.2d 936, 939 (7th Cir. 1966).

Standard Precision has attempted to support the finding of fraud by the District Court with innuendo, speculation and unjustified inferences. Israel Aircraft has addressed each of the innuendoes, speculations, arguments and unjustified inferences presented by Standard Precision in their Brief and, it is submitted, each has been shown to be without basis in the evidence.

Standard Precision argues that whether there is clear and convincing evidence of fraud is a matter left to the Court's discretion.[23] Accordingly, the issue on this appeal *as stated by Appellees* is "whether the District Court properly *exercised its discretion* in finding, on evidence supplied solely by plaintiffs, that the litigation was sufficiently infected by illegality, fraud and deception to warrant its dismissal." (Brief for Appellees, pp. 3-4) (em-

[23] See Brief for Appellees, pp. 3-4, 33-34.

phasis added). However, judicial discretion relates to the Court's power to act and not to the fact-finding process.

The underpinning of Standard Precision's argument is that the standard to be applied is whether the District Court abused its discretion in finding fraud. This is clearly a distortion of the requirement that a finding of fraud must be supported by clear and convincing evidence. (Brief for Appellant Israel Aircraft, pp. 21-22)

POINT VI

The Agreement of Israel Aircraft to Advance the Expenses, Excluding Attorneys' Fees, of the Crew in Their Claims Against Standard Precision Was Not Illegal Under New York Judiciary Law §489 or at Common Law.

By contending that the 1972 agreements constitute "champerty and maintenance," Standard Precision attempts to convert an employer's bona fide effort to assist its injured employees into an "illegal" conspiracy. This contention was not accepted by the District Court[24] and has no basis in the facts or the law.

The 1972 agreements came after Israel Aircraft's insurers had paid Israel Aircraft for the hull loss and decided to bring a subrogation action against certain defendants. The crew's personal injuries occurred during their employment in the same accident which gave rise to Israel

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[24] Standard Precision states that the District Court not only accepted its contention but actually based its decision on the holding that the agreement was illegal. (Brief for Appellees, p. 4). The District Court referred to the expense advance agreement only once (App. 215a, fn. 8); while that reference indicates that the District Court understood the nature of the second agreement it does not even suggest that the District Court viewed the agreement as illegal. The only conclusion which can be thus drawn from the record is that the District Court found Standard Precision's champerty argument unpersuasive.

Aircraft's hull subrogation claim[25] and, in any event, the crew were essential witnesses to the hull case.

Under these circumstances, when the crew members decided to pursue their claims Israel Aircraft agreed to advance the crew's litigation expenses (not including attorney's fees). The crew agreed to repay Israel Aircraft, if they were successful in their suit, for their expenses as well as the payments received from Israel Aircraft.[26] The payments made by Israel Aircraft to the crew and the agreements to reimburse them were disclosed in July 1974, when Condon & Forsyth produced the answers to the prelitigation questionnaire to Standard Precision (App. 329a, 332a and 333a) and were testified to when the crew were deposed (App. 351a-354a).

Standard Precision contends that these agreements constituted "secret" champertous agreements, which the District Court should not enforce. It is settled in New York and elsewhere that the law of champerty does not prohibit what occurred here, an employer assisting employees in need of financial help to pursue legitimate claims. *Thallhimer* v. *Brinckerhoff*, 3 Cowens Reports 623, 647 648, 15 Am. Dec. 308 (1824).

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[25] The basis for liability against Standard Precision was the same for the hull claim and the crew claims, thus Mr. Schierberl's closing argument quoted by Standard Precision. Brief for Appellee, p. 9.

[26] Standard Precision argues (Brief for Appellees, p. 37) "that plaintiffs and/or their attorneys *knowingly and fraudulently* entered into an illegal agreement." (emphasis added). In fact, under Israeli law, when an injured party has received a reparation from a benefactor, who had no legal obligation to pay such reparation, then, although such ex gratia reparation is not to be taken into account under the law, "the injured party is still under a moral obligation to return the reparation monies after he receives complete compensation from the injuring party." (Article 395 of Professor Tedeschi's "The Law of Torts", Second Edition (1976)).

Nor were the agreements champertous in violation of N.Y. Judiciary Law §489, for the agreements in this case were between an employer and an employee, were not profit motivated, and the right of reimbursement did not flow to a "stranger" to the subject matter of the litigation. Nor was there an assignment or "sale" of the claim to Israel Aircraft, for the crew in fact did sue on their own claims. *Moran Towing & Transportation Co.* v. *Conners-Standard Marine Corp.*, 226 F. Supp. 1013 (S.D.N.Y. 1963), *aff'd*, 316 F.2d 811 (2d Cir. 1963) *(per curiam)*, *Fairchild Hiller Corp.* v. *McDonnell Douglas Corp.*, 28 N.Y. 2d 325, 329, 321 N.Y.S.2d 857, 860, 270 N.E. 2d 691 (1971); *Lyon* v. *Hussey*, 31 N.Y.S. 281, 82 Hun. 15 (1st Dept. 1894).

Each of the cases cited by Standard Precision, where champertous conduct was found, involved strangers to the transaction who received all or part of the claim as part of a profit making venture.

In *Sprung* v. *Jaffe*, 3 N.Y.2d 539, 169 N.Y.S.2d 456, 47 N.E.2d 6 (1951) and *Gonzalez y Barredo* v. *Schenck*, 287 F.Supp. 505, 526 (S.D.N.Y. 1968), *rev'd*, 428 F.2d 971 (2d Cir. 1970), there was an assignment of an entire claim to an unrelated attorney.[27] In *American Optical Co.* v. *Curtiss*, 56 F.R.D. 26 (S.D.N.Y. 1971), there was also an assignment of the entire claim, and the assignee "had nothing to do with [the patent transactions] which form the basis for the instant complaint." 56 F.R.D. at 31.

In *Lyon* v. *Hussey, supra*, a layman who was a stranger to the transaction and instigated the litigation for personal profit was denied the fruits of the champertous agreement.

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[27] The District Court decisions in both *Schenck*, cited at p. 17 of Appellee's Brief, and in *Vac-Air, Inc.* v. *John Mohr & Sons, Inc.*, 53 F.R.D. 319 (E.D. Wisc. 1971), *rev'd*, 471 F.2d 231 (7th Cir. 1973), cited at p. 39 of Appellee's Brief, were reversed on appeal.

Clearly, those cases have no applicability to this case. There was no assignment or "sale" in whole or part, of the crew's claim to Israel Aircraft (Brief for Appellee, p. 290), Israel Aircraft was not a stranger to the transaction but in fact an employer-employee relationship existed between them; and the transaction had no profit element for Israel Aircraft. The Argument made in Point I of Appellee's Brief is clearly without merit on the facts of this case, as a matter of law.

CONCLUSION

The Orders appealed from should be reversed as prayed for in the Brief for Appellant Israel Aircraft Industries, Ltd.

Respectfully submitted,

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After Filing of Deferred Appendix

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

KATHLEEN A. HORTON, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 3 Washington Square Village, New York, New York 10012. That on the 25th day of April, 1977 deponent served the within Reply Brief For The Appellant upon:

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the addresses designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressd wrapper, in a post office depository under the exclusive care and custody of the United States post office department within the State of New York.

Kathleen A. Horton

Kathleen A. Horton

Sworn to before me this
25th day of April, 1977

Abraham L. Meilen

Abraham L. Meilen
Notary Public, State of New York
No. 31-9821352
Qualified in New York County
Commission Expires March 30, 1978

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